

June 28, 2012

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Via Email and First Class Mail

Re: NEPA Review of Modifications to the Continued Long-Term Coordinated Operation of the CVP and SWP to Avoid Jeopardy and Adverse Habitat Modification of Multiple Listed Species

Dear Ms. Pinero:

On behalf of the undersigned organizations and our hundreds of thousands of members and activists in California, we offer these scoping comments on the Bureau of Reclamation's NEPA review of proposed modifications to CVP/SWP operations necessary to avoid jeopardy and adverse habitat modification to several threatened and endangered fish species.¹ Our comments

¹ The undersigned groups appreciate the opportunity to submit these comments in response to the NOI prepared by Reclamation. However, we do not agree with the district court's determination that Reclamation's NEPA obligations are triggered by the agency's decision to comply with the biological opinions prepared by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service. Our participation in this NEPA review does not indicate concurrence with that decision and should not be construed as such.

focus on foundational questions regarding the proposed action, baseline, and alternatives in light of the need for the Central Valley Project (CVP) and State Water Project (SWP) to modify their operations to better protect endangered and threatened fish species. We note that the most reliable and lasting approach to reducing conflicts between CVP/SWP operations and listed species is to recover those species (as all federal agencies are obligated to do under § 7(a)(1) of the ESA) and operate the CVP/SWP in a manner that is fully compatible with long-term ecosystem health. We believe such operations are entirely feasible, and should be the focus of Reclamation's NEPA review.

I. Both The Proposed Action and Baseline Should Incorporate the Existing BiOps and RPAs

Reclamation's Notice of Intent describes the proposed action as follows: "consider operational components of the 2008 USFWS and the 2009 NMFS Reasonable and Prudent Alternatives." 77 Fed. Reg. 18860. We agree that the Reasonable and Prudent Alternatives ("RPAs") in the 2008 delta smelt and 2009 salmonid biological opinions ("BiOps") provide the appropriate starting place for the CVP/SWP operations that define the proposed action. This approach is consistent with the district court's rulings, which directed Reclamation to conduct NEPA review on its decision to implement the RPAs.

However, it is also important to recognize that those RPAs are currently being implemented, have been in place for over three years, and will remain in place at least until the pending NEPA review and BiOp remand is complete. CVP/SWP operations according to the RPAs, therefore, also represent the baseline operations for analysis under NEPA.

Reclamation and DWR recently concluded in a similar context that operations pursuant to the RPAs in the 2008 and 2009 BiOps represent "existing conditions" for analysis. The February 2012 administrative draft EIS/EIR for the Bay Delta Conservation Plan explains that "[t]he Existing Conditions assumptions for the BDCP EIR/EIS will include existing facilities and ongoing programs that existed as of February 13, 2009 (publication date of the Notice of Preparation and Notice of Intent) that could affect or could be effected by implementation of the Proposed Project and alternatives." BDCP administrative draft EIS/EIR at 3D-3, Feb. 2012 (avail. at http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/EIR-EIS_Appendix_3D_Defining_Existing_Conditions_No_Action_Alt_No_Project_Alt_and_Cumulative_Impact_Conditions_2-29-12.sflb.ashx). Those ongoing programs include the 2008 delta smelt BiOp. *Id.* at 3D-107. The BDCP EIR/EIS also defines the 2009 salmonid BiOp as part of existing conditions, even though it was finalized after the February, 2009 publication date of the NOI (unlike the case here). *Id.* at 3D-105. The draft explains that:

For the purposes of the BDCP EIR/EIS, the Existing Conditions also includes the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Biological Opinion (NMFS BiOp) on the Long-Term Operations of the Central Valley Project and State Water Project (Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, Southern Distinct Population Segment of North American green sturgeon, and

Southern Resident killer whales.) The NMFS BiOp was issued on June 4, 2009 in response to a request issued in 2006 by U.S. Bureau of Reclamation (Reclamation) for reconsultation of a NMFS BiOp issued in 2004. Reclamation issued a revised biological assessment in August 2008, and a draft NMFS BiOp was issued for peer review on December 11, 2008. Although the NMFS BiOp was published following the NOP, most of the provisions were being discussed prior to the NOP. Therefore, the NMFS BiOp is included in the Existing Conditions.

Reclamation should similarly include the requirements of both BiOps in the baseline here.

II. Reclamation Should Define the Project Purpose Expansively and Consider a Wide Range of Alternatives

A. The 2008 Biological Assessment and Contractual Obligations Should Not Limit the Reasonable Range of Alternatives

Alternatives development is driven by identifying different approaches to achieving the same project purpose. Reclamation's NOI describes the purpose of the action as continuing the coordinated operations of the CVP and SWP "as described in the 2008 Biological Assessment (as modified)" in a manner that avoids jeopardy and adverse habitat modification of listed species and is consistent with law and other requirements, including "contractual obligations." 77 Fed. Reg. 18859. To the extent that Reclamation views either the 2008 Biological Assessment or contractual obligations as limiting the range of reasonable alternatives, we urge you to omit these qualifiers from the project purpose.

The 2008 Biological Assessment describes only one of several possible ways of operating the CVP and SWP in a coordinated manner and in compliance with legal and other obligations. Moreover, the operations described in the 2008 Biological Assessment would indisputably lead to jeopardy and adverse modification of critical habitat for numerous listed species, conflicting with one of the primary purposes of the project as described in the NOI.² Because numerous alternatives exist to operating the CVP and SWP as described in the 2008 Biological Assessment – alternatives that better meet the objectives of avoiding jeopardy and adverse habitat modification – Reclamation should not limit the range of alternatives analyzed under NEPA to those that comply with the 2008 Biological Assessment.

Similarly, Reclamation and DWR have signed long-term water delivery contracts for the CVP and SWP that far exceed the capacity of the Projects to meet on a regular basis, let alone in an environmentally sustainable manner. Full contract deliveries for both Projects have rarely, if ever, been made, and are based on invalid build-out assumptions, outdated land use assumptions,

² While Judge Wanger found certain deficiencies in the 2008 and 2009 BiOps and remanded them back to the agencies to address those deficiencies, he upheld the basic conclusions of both BiOps, confirming that Project operations as proposed in the 2008 Biological Assessment would cause jeopardy and adverse habitat modification for several listed species.

and extremely favorable hydrology that occurs only very infrequently. Contract quantities are, therefore, unrealistic, and should not limit the range of reasonable alternative operating regimes.

In addition, contract “obligations” do not trump Reclamation’s duties to conserve threatened and endangered species and their critical habitats under the Endangered Species Act. As the court explained in *Pacific Coast Fed’n of Fishermen’s Assocs. v. Gutierrez*, “[a]s a top priority, the Bureau must ‘insure that actions authorized funded or carried out by [it] do not jeopardize the continued existence’ of a listed species,” even if doing so would require that the Bureau ‘alter ongoing projects in order to fulfill the goals of the Act.’” 606 F. Supp. 2d 1195, 1202 (E.D. Cal., 2008) (emphasis added) (quoting *TVA v. Hill*, 437 U.S. 153, 186 (1978)); see also *NRDC v. Kempthorne*, 2008 WL 5054115, * 16 (E.D. Cal., Nov. 19, 2008) (shortage provisions in CVP water service contracts “prevent the Bureau from suffering any liability for curtailing deliveries ... when necessary to effectuate ESA purposes” and render the contracts “entirely defeasible if the ESA so requires”). Meeting contract quantity amounts is, therefore, neither a reasonable nor a legally-required objective.

B. Alternatives Should Consider Reclamation’s Non-ESA Environmental Obligations
and Alternative Water Supplies

We urge Reclamation to formulate alternatives that analyze both the agency’s (and DWR’s) non-ESA environmental obligations, as well as ways that alternative water supplies could be used to alleviate or eliminate the impacts of reduced export water supplies.

1. Alternatives Should Include Measures to Meet State and Federal Salmon
Doubling Mandates

Numerous non-ESA environmental obligations apply to Reclamation that should cause it to modify Project operations in a manner that is more protective of the environment than the baseline RPAs. For example, the Central Valley Project Improvement Act directs DOI to develop and implement a program that makes “all reasonable efforts” to ensure and sustain on a long-term basis a doubling of the number of naturally produced anadromous fish in Central Valley rivers and streams, using the average levels attained during the period of 1967-1991 as the baseline. CVPIA § 3406(b)(1). The plan was due by 1995, and the doubling goal was to have been met by 2002. Section 3406(b)(2) directs DOI to “dedicate and manage” 800,000 acre-feet of CVP yield each year for the primary purpose of implementing the CVPIA’s restoration mandate. This dedicated yield may also be used “to assist” California in addressing Bay Delta water quality and “to help meet” the CVP’s ESA obligations. Section 3406(b)(1) directs DOI to use the (b)(2) water “as needed to achieve the goals of” the doubling program.

These statutory salmon doubling requirements have been reinforced by several judicial decisions and independent reviews. On January 23, 2004, the 9th Circuit issued a decision regarding CVPIA § 3406(b)(2), clarifying that:

The district court erred in concluding that Interior lacks discretion to refrain from crediting the amount of [CVP water] actually used for any (b)(2) purpose against the

designated 800,000 acre feet of Project yield. To hold otherwise would be to defeat the primary purpose for which the 800,000 acre feet were designated – fish, wildlife and habitat restoration.... If Interior were required to deduct some or all the water it uses for water quality and Endangered Species Act purposes from the (b)(2) dedication, the water needed for implementation of the Improvement Act’s restoration mandate could be relegated to a secondary role, or perhaps no role at all. *Such a scenario would directly conflict with the Interior’s mandate to give effect to the hierarchy of purposes established in Section 3406(b)(2).*

Bay Institute of San Francisco v U.S., 87 Fed. Appx. 673, 639-640 (9th Cir. 2004) (emphasis added). In subsequent litigation, the 9th Circuit reaffirmed and substantially expanded upon its 2004 decision. See *San Luis & Delta Mendota Water Authority v U.S.*, 672 F.3d 676 (9th Cir. 2012). The 2012 decision explained that the CVPIA’s “restoration mandate” is distinct from the environmental protections provided for in other statutes, may not be subsumed by Reclamation’s separate duties under the ESA and other statutes, and may not be relegated to a secondary role. *Id.* at 705-7. The decision also clarified that Reclamation’s existing 2003 Guidance on b(2) implementation is invalid in some respects, *id.* at 708-9, and chastises the agency for failing to implement a more coherent approach and set of accounting procedures in the wake of the 2004 Ninth Circuit decision. Now, more than eight years after *Bay Institute*, Reclamation has yet to correct the flaws in its b(2) policy to allow it to effectively achieve the salmon doubling goal that Congress directed more than two decades ago.

In addition to these unambiguous mandates from the courts, in 2006, the U.S. Office of Management and Budget (OMB) raised questions about DOI’s failure to comply with the CVPIA’s salmon doubling mandate and recommended a comprehensive review. In 2008, Interior organized the review that resulted in the Listen to the River report. See “Listen to the River: An Independent Science Review of the CVPIA Fisheries Program” (December 2008). Listen to the River concludes that “[a]fter 16 years of implementation, the CVPIA anadromous fish program is not close to its stated doubling goal, nor has it solved the problems that led to the listing of several species of salmon and steelhead under the ESA.” The independent review additionally concluded that DOI’s program was unable to “attack the fundamental system-level problems or realize the greatest biological benefit in an effective way,” finding that the agencies: had not developed a proper conceptual foundation and framework for the program; had organized and managed the program in a compartmentalized way rather than an integrated, systematic and scientific way; had not addressed key fisheries problems at the systems level; had failed to prioritize and address effectively the problems in the Delta; and had substantially underutilized CVPIA authorities, especially with regard to water management and the issues in the Delta.

The Panel’s primary finding was that, although DOI has taken actions that have been beneficial, it bears substantial responsibility for continued salmon declines. It recommended that DOI approach the salmon doubling mandate with the “same zeal” it approaches its water supply mission and use the authority delegated to it by Congress accordingly.

This NEPA review provides an excellent opportunity for Reclamation to correct decades of failed implementation of the CVPIA's salmon doubling mandate and formulate alternative operations that will meet the mandate, focused as it is on ways to improve operations to avoid adverse impacts to fish species.³ We urge Reclamation to seize the opportunity and correct this longstanding wrong.

2. Reclamation's Development of Alternatives and Impacts Analysis Should Consider the Availability of Existing and New Alternative Water Supplies

The water contractors that sued Reclamation to prompt this NEPA review focused almost exclusively on the impact of CVP/SWP water supply delivery reductions that they alleged were "caused" by RPA compliance. This focus is incorrect for a number of reasons, including the fact that CVP/SWP contractors are not entitled to receive water deliveries when that water is needed for threatened and endangered species protection. Moreover, as explained above, both Reclamation and DWR have numerous non-ESA environmental obligations that likely exceed the effect of RPA compliance on water supplies if properly implemented, including salmon doubling obligations, public trust requirements, California ESA obligations, Fish and Game Code § 5937 requirements to keep fish in good condition below dams, and more. While California needs to maintain an adequate water supply to meet the needs of a growing population and economy, water delivered from the CVP and SWP is a small portion of the total water supplies both used by and available to the State, and cannot and should not be viewed in isolation from other supplies available to meet the State's water supply needs and CVP/SWP contractors' water supply needs. We urge Reclamation to take a far more holistic view of the State's available and potential water supplies when considering alternative operational scenarios and assessing water supply impacts.

For example, Bulletin 160 published by DWR every three years identifies a large and growing supply of alternative water supply options available throughout the State and to a variety of water users. We have appended to these comments the "highlights" summary from the most recent 2009 bulletin 160. Attachment 1. It provides DWR's analysis of potential new water supplies available from a variety of improvements in agricultural and urban water use efficiency, recycled water, and improved groundwater management. Att. 1 at 18. We've also appended the State Water Resource Control Board's policy establishing goals for more stormwater capture and use in the State by 2020 and 2030. Attachment 2. Collectively, these documents from the State's water agencies identify the following range of potential new water supplies available to the State in the near term:

Agricultural water use efficiency:	0.1-1.0
Urban water use efficiency:	1.2-3.1
Groundwater:	0.5-2.0

³ A similar requirement exists in state law, and applies to DWR. Cal. Fish & Game Code § 6902; State Water Resources Control Board, *Water Quality Control Plan for the San Francisco Bay / Sacramento-San Joaquin Delta Estuary* (May 1995), 18, 28-29; State Water Resources Control Board, *Water Quality Control Plan for the San Francisco Bay / Sacramento-San Joaquin Delta Estuary* (2006), 14, 33-34.

Recycled water:	1.8-2.3
Urban stormwater:	<u>0.5-1.0</u>
Total:	4.1-9.4 MAF

Obviously, the potential to generate new water supplies from investing in these alternatives to CVP/SWP water supplies is enormous and dwarfs the alleged water supply impacts “caused” by operating the Projects in compliance with the ESA. In fact, even the conservative estimates above represent a potential nearly equal to the combined Delta exports of the CVP and SWP.

Moreover, Reclamation and DWR have the ability to make or require many of these investments, from requiring contractors to improve efficiency of use as a condition of receiving Project supplies, to making new investments in recycled water projects under Title XVI and investments in conservation through the Bureau’s WaterSMART program and existing state bond funds.

In addition, this document should include an analysis of the significant progress made in recent years by water users south of the Delta in reducing reliance on the Delta and increasing water use efficiency. This progress has been seen in both the agricultural and urban sectors. For example, the City of Los Angeles has been able to serve the needs of a growing population over the past three decades without increasing the use of imported water. This has been made possible through investments in water use efficiency, water recycling and other tools. In 2011, LADWP adopted a new Urban Water Management Plan that proposes to go further. LADWP now proposes to reduce their use of water imported by MWD from 48 percent of total water use today to 24 percent by 2035. Other cities have adopted similar UWMPs designed to reduce reliance on the Delta.

Water users in the agricultural sector have made similar progress in improving water use efficiency, leading to an ability to generate more revenue using less water. In the agricultural sector, additional progress can be made through improvements in irrigation efficiency, deficit irrigation, land retirement, voluntary water transfers, crop shifting and other tools.

Reclamation should also analyze the additional benefits of investments to reduce reliance on the Delta, including reduced energy use and greenhouse gas emissions.

Finally, Reclamation’s analysis must reflect the state policy, established in SB 7X1 and codified at Water Code § 85021 to reduce reliance on Delta water supplies:

The policy of the State of California is to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.

This state policy requires Reclamation to change its traditional focus on maximizing water deliveries and focus instead on a broader set of tools that have the potential to reduce reliance on CVP and SWP deliveries. These tools offer the potential to allow water users to meet their needs while assisting in the restoration of the Bay-Delta ecosystem. (Reclamation must comply with this state requirement pursuant § 8 of the Reclamation Act of 1902 and § 3406(b) of the CVPIA.)

In summary, Reclamation can and should analyze ways to increase water supplies to its contractors through a variety of these investments in its alternatives analysis. Reclamation should also consider these and other supplies available to its contractors when analyzing impacts, as investments by the contractors and their member agencies can and should allow the contractors to better meet water needs in a way that is fully compatible with reduced exports under the BiOps.

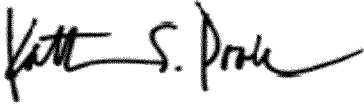
Other Issues

Finally, there are a number of additional issues that we urge Reclamation to consider in formulating alternatives and conducting its NEPA review, based on scientific information revealed after the BiOps were finalized and on experience in implementing the BiOps:

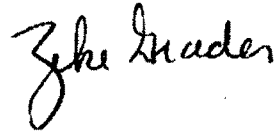
1. Revise the winter run Chinook salmon JPE calculation to reflect the best available science, including corrections for overestimation of in-river survival to the Delta in light of the results of acoustic tagging studies by MacFarlane and others since 2008.
2. Improve the “first flush” trigger to reflect when delta smelt begin upstream migration to spawn.
3. Make seasonal Old and Middle River flow requirements more restrictive to further reduce entrainment of early spawning larval and juvenile delta smelt, consistent with Bennett 2008.
4. Fully analyze and reduce impacts of CVP and SWP operations on primary productivity and food supply for delta smelt and salmonids, including effects of reduced spring outflow, exports, barrier operations, and changes in residence time, consistent with Jassby & Cloern 2000, Kimmerer 2009, and SWRCB 2010.
5. Increase San Joaquin River inflow to reflect SWRCB flow requirements, post-VAMP D-1641 requirements, and the recent testimony of the Department of Fish and Game and others.
6. Consider necessary protections for longfin smelt, particularly increased spring Delta outflow, should the species be listed under the ESA by the Fish and Wildlife Service during the period of remand.

Thank you for considering our input.

Sincerely,



Katherine S. Poole
Natural Resources Defense Council



Zeke Grader
Pacific Coast Federation of
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Gary Bobker
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Jonas Minton
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